Supreme Court, U. S.
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No. 77-1817

In the

Supreme Court of the United States

OCTOBER TERM, 1978

IN RE: ROBERT F. McPARTLIN,
A WITNESS BEFORE THE SPECIAL
MARCH, 1978 GRAND JURY

ROBERT F. McPARTLIN,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM J. HARTE
RICHARD J. PRENDERGAST
111 West Washington Street
Chicago, IL 60602
(312) 726-5015

The Scheffer Press, Inc.—(312) 263-6850

SUBJECT INDEX

PAGE

Citations To Opinions Below 1

Jurisdiction 1

Qnestions Presented 2

Constitutional And Statutory Provisions 2

Statement 3

Reasons For Granting Writ 7

Conclusion 14

Appendix A

Opinions Of The Courts Below 1a-9a

Appendix B

Statutory Provisions 10a-11a

Table of Authorities

Cases:

Blair v. U. S., 250 U.S. 273 (1918) 10

Branzburg v. Hayes, 408 U.S. 665 (1971) 10

Corona v. U. S., 250 F.2d 578 (6th Cir. 1958) 9

Doyle v. U. S., 366 F.2d 394 (9th Cir. 1977) 11

In re Baldinger, 356 F.Supp. 153 (D.C. Cal. 1973) 9

In re Bart, 304 F.2d 631 (D.C. Cir. 1962) 8

In re Bonk, 527 F.2d 120 (7th Cir. 1975) 12

In re Liddy, 506 F.2d 1293 (D.C. Cir. 1974) 12

In Matter of Doe, 410 F.Supp. 1163 (E.D. Mich. 1976) 9, 12

PAGE

Kastigan v. U. S., 406 U.S. 441 (1971) 10
McNabb v. U. S., 318 U.S. 332 14
Rodriguez v. U. S., 395 U.S. 327, 329-30 (1969) .. 11
Ullmann v. U. S., 350 U.S. 422 (1955) 7
United States v. Calandra, 414 U.S. 338 (1974) .. 12
Watkins v. U. S., 354 U.S. 178, 187-88 (1957) 10

STATUTES:

18 U.S.C. § 6002 .....2, 3, 4, 7, 8
18 U.S.C. § 6003 2
28 U.S.C. § 1826 ..... 2, 5

IN THE

SUPREME COURT OF THE UNITED STATES

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No.

IN RE: ROBERT F. McPARTLIN,
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ROBERT F. McPARTLIN,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit rendered in the above entitled case on May 22, 1978.

CITATIONS TO OPINIONS BELOW

The opinions of both the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit are unpublished. They are set forth in Appendix A to this Petition.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 22, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

The constitutional provisions involved include the Due Process clause of the Fifth Amendment, and that provision of the Sixth Amendment guaranteeing the right to effective assistance of counsel. The statutory provisions include 18 U.S.C. §6002 and §6003 and 28 U.S.C. §1826. Pertinent statutory provisions are set forth in Appendix B to this Petition.

QUESTIONS PRESENTED

1. Whether 18 U.S.C. §6003, providing that upon presentation of a petition for immunity by the government, the District Court "shall issue . . . an order requiring [respondent] . . . to give testimony . . ." deprives the court of any discretion to refuse to issue an immunity order and renders the District Court's function purely ministerial, even though the respondent-witness asserts that to compel his testimony *at this time* would violate his rights to due process of law and effective assistance of counsel in a related appeal.

2. Whether the courts below erroneously viewed the function and duties of District Courts under 18 U.S.C. §6002 and §6003 as non-discretionary and ministerial.

3. Whether the District Court erred in requiring petitioner to testify before a grand jury under a grant of immunity during the pendency of his appeal, where the subject matter of the criminal appeal and the grand jury investigation are the same, and petitioner's counsel are engaged in preparing his brief on appeal.

4. Whether the District Court should have conducted a hearing, under the exigent circumstances of this case, to consider petitioner's constitutional claims and to consider whether any necessity existed that he testify *at this time.*

STATEMENT

This petition arises from a refusal by petitioner to appear before a Special March 1978 Grand Jury. The subject matter of the inquiry before that Grand Jury was the same as that included in a case wherein petitioner suffered an adverse jury verdict and conviction. That case is presently on review before the United States Court of Appeals for the Seventh Circuit. *United States* v. *Ingram, et al.,* No. 77-2280.

On June 28, 1976, Petitioner was indicted for alleged violations of 18 U.S.C. §§1343 and 1952. The indictment charged generally that he participated in a scheme to extort and accept bribes from certain persons concerning the removal of treated sewage or "sludge" of the Metropolitan Sanitary District of Greater Chicago ("MSD"). At no time during the extensive grand jury investigation that preceded return of the indictment, and at no time prior to completion of the trial which followed, was application made by the United States Attorney pursuant to 28 U.S.C. §6002 to obtain an order granting immunity to petitioner.

The trial resulted in verdicts of guilty as to petitioner and certain of the co-defendants, and in due course, notices of appeal were filed. Thereafter, petitioner's trial counsel withdrew as his attorney; William J. Harte and Richard J. Prendergast filed their appearances as appellate counsel on February 1, 1978. An order was subsequently issued by the Court of Appeals for the Seventh Circuit which set forth a schedule for the filing of briefs by all parties.

Shortly thereafter, on March 22, 1978, the Government petitioned the District Court for an order granting immunity to petitioner under §6002, Title 18, United States Code, to compel his testimony before a Special March 1978 Grand Jury of the Northern District of Illinois. In support of that petition the Government stated that petitioner had previously indicated his intention to claim the Fifth Amendment in response to questions pertinent and material to the grand jury investigation, and that the Office of the United States Attorney had received approval from the Department of Justice to seek an order granting immunity in regard to petitioner's testimony.

The District Court granted the Government's petition and entered an Order which required Petitioner to give testimony before the Special March 1978 Grand Jury under a grant of immunity. This order was entered over Petitioner's specific objection that Petitioner's testimony was not "necessary" *at this time* and that the entry of the order was a discretionary function. The District Court took the position that it lacked any discretion, save to determine whether the grand jury process was being purposely abused and subverted, a contention which had not been advanced by petitioner. The District Court agreed with the Government that the entry by the Court of an immunity order was a purely ministerial act required upon application by the Government.

On April 5, 1978, petitioner appeared before the Special March 1978 Grand Jury and refused to answer questions relevant to the Grand Jury's inquiry; the Government then filed a petition with the District Court to hold Petitioner in civil contempt and for other relief. Contemporaneously with the Government's petition, petitioner filed a petition for an order excusing him from giving testimony before the Grand Jury and for other relief, reiterating his prior objection that the subject matter of that Grand Jury's investigation is the same as that in *United States* v. *Ingram, et al.*, which is presently in the process of appeal. He further claimed that his counsel was in the midst of preparing his appellate brief and requested that he be excused from testifying during the pendency of that appeal. The District Court issued a Memorandum Opinion and Order on April 25, 1978, granting the Government's petition and denying that of petitioner.

On April 26, 1978, the District Court was again advised that Petitioner would respectfully decline to testify before the Special March 1978 Grand Jury, and upon said representation, the Court ordered that Petitioner be confined pursuant to 28 U.S.C. §1826. Upon application of Petitioner for bail pursuant to 28 U.S.C. §1826(b), and following a specific finding that the issues raised herein were "serious issues . . . raised in a serious manner" and not "frivolous", the District Court allowed Petitioner's recognizance bond to stand as bond in the appeal.

On appeal, petitioner contended that:

(1) The District Court erroneously viewed its function and duties under 18 U.S.C. §6002 and §6003 as non-discretionary and ministerial, and failed to exercise discretion in granting the Government's Petition for an order of immunity;

(2) The District Court erred in its interpretation of 28 U.S.C. §1826, in confining its inquiry (regarding the finding of contempt and the ordering of confinement) to the question of whether the records showed an abuse of the Grand Jury proceedings by the United States Attorney;

(3) The District Court erred in granting immunity and requiring the Appellant to testify before the Grand Jury during the pendency of his appeal in *United States* v. *Ingram, et al.*, where the subject matter of the criminal appeal and the matters being considered by the Grand Jury were identical, particularly where the Grand Jury subpoena, the District Court's immunity order, and the order of contempt and confinement, all issued subsequent to the Court of Appeals' order setting a briefing schedule for petitioner's appeal and before his counsel had had an opportunity to prepare his brief in that appeal;

(4) The immunity order, and the order of contempt and confinement, under the circumstances of this case, deprived petitioner of effective assistance of counsel, and otherwise violated his rights to due process of law in relation to his criminal appeal, particularly in the absence of any exercise of discretion by the District Court and any showing by the Government that petitioner's Grand Jury testimony is necessary *at this time.*

Petitioner's appeal from the District Court's order was heard by the Seventh Circuit on an expedited briefing schedule. On May 22, 1978, the Seventh Circuit affirmed the ruling of the District Court. In so doing, the Seventh Circuit held that "the district court's function is largely ministerial", that "necessity" was a determination to be made by the United States Attorney, and that the "district court need not, and can not, hold a hearing as to the 'necessity . . . at this time' for respondent to testify". As to the effective assistance of counsel issue, the Seventh Circuit held simply that "[v]alid laws serving substantial public interests may be enforced . . . despite the possible burden that may be imposed."

REASONS FOR GRANTING THE WRIT

This case presents to this Court a novel question regarding the discretion invested in a District Court to decline to grant a grand jury immunity order when granting the order would violate due process and effective assistance of counsel rights of the witness to whom the order is directed. Specifically, this Court should grant certiorari to review the lower court opinions that a District Court has only a ministerial function to perform when confronting an immunity application by the Government, even where the subject matter before the Grand Jury is the same as that on appeal from a related conviction.

I.

THE DISTRICT COURT ERRONEOUSLY VIEWED ITS FUNCTION AND DUTIES UNDER 18 U.S.C. §6002 AND §6003 AS NONDISCRETIONARY AND MINISTERIAL.

The language of the immunity statute, 18 U.S.C. §6002, provides that a United States District Court shall issue an immunity order when requested by the United States Attorney for such District, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General. The United States Attorney may request such an order when the testimony sought is deemed by him to be in the public interest and the individual whose testimony is sought has refused or is likely to refuse to testify.

It may be that the District Court has little or no discretion to determine whether or not the testimony which the U.S. Attorney wishes to obtain is *in the public interest. Ullman* v. *United States,* 350 U.S. 422 (1955). *Ullman,* however, did not address itself to any other areas with-

in which the District Court would be free to inquire. It is within these other areas that the present case falls, particularly whether the District Court can review the petition for immunity to determine whether an individual's due process rights are being infringed. The Courts below held that such discretion did not exist. Petitioner respectfully submits that those courts erred, ignoring the constitutional rights of Grand Jury witnesses and the judiciary's supervisory role in protecting those rights.

While the Grand Jury retains the broad inquisitorial power inherent in its origins, today it is common knowledge that its principal function is to serve as the key investigatory vehicle for the prosecutor. In view of this commonly acknowledged fact and the immense powers of the Grand Jury, the judiciary cannot properly view its own function as nondiscretionary and ministerial. Under certain circumstances—and petitioner suggests that this case is one example—the prosecutor should be required to do more than profer the gratuitious statement that the witness's testimony is in the public interest. Otherwise, the Government is free, irrespective of the circumstances, to contend that it may cause any person, at any time, to appear before the Grand Jury, simply by filing an application for a grant of immunity pursuant to §6002, without regard for the consequences which might follow in terms of the witness's constitutional rights.

Some federal courts have already recognized their discretionary role with regard to the Grand Jury. *In re Bart*, 304 F.2d 631 (D.C. Cir. 1962), for example, recognized that the District Court has more than a clerical duty to fulfill in protecting a potential witness from the abuse of his constitutional rights. The protection of an individual's due process rights was also intrinsically assumed

by the Sixth Circuit in *Corona* v. *United States*, 250 F.2d 578, 579 (6th Cir. 1958) (orders to testify "were issued in such a manner as to afford due process of law for the appellant, and were, therefore, lawful orders . . ."). *See also, Matter of Doe*, 410 F.Supp. 1163 (E.D. Mich. 1976) ("the Court may exercise its discretion in denying an immunity order in the face of a violation of a witness's constitutional rights.").

Similarly the issue in this case is "whether the court has discretion to decline to grant an immunity order when granting the order would violate the constitutional rights of the witness to whom the order is directed. The issue is one of constitutional dimension, not merely one of determining what is in the public interest", *In re Baldinger*, 356 F.Supp at 169. The *Baldinger* Court found impetus for this discretion in the legislative history of the immunity statute. In reference to the immunity provision, Senator McClellan, who was a senior member of the Senate Judiciary Committee and who appeared before the House Judiciary Committee, stated: "The granting of immunity in court and legislative proceedings is subject to court review . . .". Hearings on S.30 Before Subcommittee No. 5 of the House Committee on the Judiciary. 91st Cong. 2d Sess., ser. 27, at 83, *cited in* 356 F.Supp. at 170. Furthermore, during House hearings in 1969 on the Organized Crime Control Act of 1970, Title II, Professor Robert Dixon, a consultant to the National Commission on Reform of Federal Criminal Laws, testified that the court's function in immunity cases does not preclude "a court check to see if there is an overreaching in the process of immunizing somebody just as a matter of due process". Hearings on H.R. 1157 and H.R. 12041 Before Subcommittee 3 of the House Committee on the Judiciary, 91st

Cong. 1st Sess., ser. 14, at 69 (1969), *cited in* 356 F.Supp. 170-71.

The District Court in this case refused to recognize that it had any discretion before deferring to the Government's immunity application, and therefore disregarded its own role for safeguarding the constitutional rights of United States citizens. *See Watkins* v. *United States,* 354 U.S. 178, 187-88 (1957). In so doing, the court disregarded this court's admonition that the Grand Jury's powers are neither unlimited nor absolute, and are subject to Judicial supervision. *Branzburg* v. *Hayes,* 408 U.S. 665, 688 (1971); *Kastigan* v. *United States,* 406 U.S. 441, 444 (1971). This court has explicitly stated that instances may exist where special reasons excuse testimony. *Blair* v. *United States,* 250 U.S. 273, 281 (1918). In this case petitioner appeared before the District Court and requested that a petition for immunity be denied or delayed because the Grand Jury intended to delve into subjects regarding which he already stood convicted and was in the process of appealing. At that time the court stated it had no discretion to review the request. Petitioner asks this Court to define the scope of review invested in courts when considering immunity requests. The courts below avoided the issue by erroneously holding that no such power exists.

II.

THE DISTRICT COURT ERRED IN GRANTING IMMUNITY AND REQUIRING PETITIONER TO TESTIFY BEFORE A GRAND JURY DURING THE PENDENCY OF HIS APPEAL WHERE THE SUBJECT MATTER OF THE CRIMINAL APPEAL AND THE GRAND JURY INQUIRY WERE THE SAME.

This court has held that an appeal from a District Court's judgment of conviction in a criminal case may be

taken as a matter of right. *Rodriguez* v. *United States,* 395 U.S. 327, 329-30 (1969). This necessarily assumes that the appeal be a fair and sufficient one. *See Doyle v. United States,* 366 F.2d 394 (9th Cir. 1966). Absent the latter corollary, the initial right to appeal would be an empty privilege.

When a District Court orders a party to testify before a Grand Jury during the pendency of an appeal that reaches similar issues, the individual's rights of due process and fair appeal are chilled. This can be illustrated in several ways. For example, in the instant case, should petitioner continue to maintain his innocence in testifying before the Grand Jury, his testimony will be of little value to the Government in the context of its present investigation. Naturally, in view of the Jury's verdict, the Government will be virtually compelled to indict petitioner for perjury under the circumstances. On the other hand, should petitioner's testimony incriminate him in the scheme alleged in the indictment, and should that testimony become a matter of public knowledge prior to disposition of his appeal*, it could seriously impair any claim he might have on appeal that his conviction should be reversed based on insufficiency of evidence presented at trial. Thus, to compel petitioner to give testimony at this particular time chills and thus infringes upon his right to an unprejudiced and effective appeal.

A by-product of this situation is the prejudice suffered by petitioner in terms of effective assistance of counsel on appeal, who must juggle time appealing petitioner's conviction while attempting simultaneously to aid him in his presentation before the Grand Jury. Counsel's resources

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* E.g., either by a Grand Jury "leak", through the return of an indictment of another person, or during a subsequent trial thereon.

are thus strained between the constant pull between the appellate process and the Grand Jury process. It should be noted that petitioner is not required to show how he has already been prejudiced or guarantee that he will be prejudiced by this violation of his constitutional rights. It is sufficient that the fair administration of justice has been jeopardized. *Matter of Doe*, 410 F.Supp. 1163 (E.D. Mich. 1976).

This particular infringement on a party's due process rights is a novel question for this Court, the minimal lower court guidance that exists runs only to peripheral issues. The Seventh Circuit's earlier opinion in *In re Bonk*, 527, F.2d 120 (7th Cir. 1975), for instance, compelling a grand jury witness to testify regarding related matters, dealt with a situation where the defendant had already been acquitted, and thus was not engaged on appeal. The District of Columbia Circuit faced a situation similar to the one at bar in *In re Liddy*, 506 F.2d 1293 (D.C. Cir. 1974), but there the defendant based his argument solely on the likelihood of his statement being used against him in a later retrial (i.e., self-incrimination). The court did not confront the denial of his due process rights to a fair appeal and effective assistance of counsel.

An individual before a grand jury retains his constitutional rights. A grant of immunity supplants his right to invoke the Fifth Amendment self-incrimination clause, but it does not negate all other protections. "[T]he grand jury power is not unlimited. It may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." *United States* v. *Calandra*, 414 U.S. 338, 346 (1974). Petitioner respectfully requests that he not be compelled to testify before the Grand Jury *at this time*. He acknowledges his duty to appear and testify in due course; thus Petitioner contests neither the importance of grand jury investigations nor the case precedent supporting their investigatory significance. He does state, however, that there are constraints to that power, not the least of which concern deprivations of a citizen's constitutional rights. Petitioner contends that the fundamental rights of citizens include much more than the Fifth Amendment privilege against self-incrimination. The penchant of the Government to utilize the immunity statute *at this time* not only contravenes his right to a free and unobstructed appeal from his conviction, but places him in an intolerable position should appeal prove to be successful.

III.

THE DISTRICT COURT SHOULD HAVE CONDUCTED A HEARING TO CONSIDER PETITIONER'S CONSTITUTIONAL CLAIMS AND TO CONSIDER THE NECESSITY FOR PETITIONER TO TESTIFY AT THIS TIME.

Petitioner is not now nor has he ever quarreled with his obligation to testify before a Grand Jury. Yet it is patently unfair for the Government, which is appellee in appeal proceedings presently before the Seventh Circuit Court of Appeals, to cause Petitioner, who is appellant, to testify before a grand jury regarding the very facts which are the subject of that appeal. Although requested to do so, the Government made no showing that the return of an indictment against any person in any way hinges upon the testimony of petitioner.

This Court exercises supervisory authority over the administration of criminal justice in the federal courts, and this court has accepted the responsibility to maintain civilized standards of procedure. *McNabb* v. *United States,* 318 U.S. 332, 340-41 (1942). An aspect of this responsibility is the crucial role played by all courts to insure that individual rights are not trammelled. It is anomalous to permit courts to abdicate this duty by interpreting their own role in the grand jury procedure as non-discretionary and ministerial.

The record in this case reveals no showing that it is imperative for petitioner to testify *at this time,* prior to the rendering of a decision on appeal. Not until the District Court conducts an inquiry balancing the substance of petitioner's claim and his constitutional rights with whatever exingencies may exist for the Government, can the District Court exercise its discretion to make an informed decision in this case.

CONCLUSION

For the reasons set out above, Petitioner respectfully submits that the petition for certiorari should be granted.

Respectfully submitted,

WILLIAM J. HARTE
RICHARD J. PRENDERGAST
111 West Washington Street
Chicago, Illinois 60602
(312) 726-5015

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

IN RE: ROBERT F. McPARTLIN,
A WITNESS BEFORE THE SPECIAL
MARCH 1978 GRAND JURY

No. 74 GJ 1010

MEMORANDUM OPINION AND ORDER

On March 22, 1978 the Government's petition to grant one Robert F. McPartlin immunity under Title 18, U.S.C. §6002 was allowed. This was done when Mr. McPartlin asserted that if he should be subpoened to testify before the Special March 1978 Grand Jury, he would claim his Fifth Amendment privilege against self-incrimination and would refuse to produce any documents demanded of him. The order granting immunity to McPartlin was not appealable. This matter is now before me for a determination as to whether the now immunized witness should be adjudged in civil contempt of this Court, pursuant to 28 U.S.C. § 1826, for refusing to answer questions posed to him by agents of the Grand Jury, this violating the Court's order granting immunity At the same time a rule to show cause issued, the witness filed his own motion asking for an order excusing his testimony.

I have concluded that the witness' motion should be denied and the Government's motion should be allowed.

The witness believes that the subject matter of the current investigation by this Special March 1978 Grand

Jury is the same as that involved in *United States* v. *Ingram, et al.*, No. 76 CR 779, a case in which he was convicted and sentenced. That case is on appeal. This fact, however, does not relieve him of his obligation to testify. I find no evidence that because of the simultaneousness of these proceedings Mr. McPartlin's ability to prosecute effectively his appeal will be chilled or that he otherwise will be deprived of his Sixth Amendment right to effective counsel in the higher court. And I fail to see how a retrial of the case now on appeal after his testifying before this grand jury would result in injury to him. None of the evidence he must present the Grand Jury under my order, nor any information directly or indirectly derived from it could be used against him in a retrial of the case on appeal. Rather, it would be the government by its pursuit of its present course before the Grand Jury that would more likely be injured in a retrial of the case once tried. I assume that the Court of Appeals has often handled a case involving a person who at the same time was actively involved in other litigation growing out of the same transaction.

Under the instant circumstances, the burden is on the witness to come forward with some factual showing that what the United States Attorney is doing constitutes an abuse of the grand jury and its processes. He has offered nothing to show, for example, that the government is doing this just to harass him, or to trick him into a jailing for contempt while he is out on bail pending appeal, or to frustrate his pursuit of his appeal.

I am informed that it is probable that without this witness' testimony the Grand Jury may not be able to bring an indictment against certain other individuals who may have been involved in the transactions for which he stands convicted. Mr. McPartlin may not assert for them any objection they may have against his testifying. If he has any recognizable privilege against testifying which is personal to him, other than the privilege against self incrimination, he is free to assert it before the Grand

Jury. And if it is a valid privilege the court will uphold his proper assertion of it. His immunity removes only his Fifth Amendment right.

The witness urges that it does not seem appropriate that, after his having suffered an investigation by a Grand Jury, an indictment, a long exhausting trial, a conviction, and a sentence, the Government should now find it necessary to bring him back before a Grand Jury, give him use immunity, and require him to testify about the same subject matter which led to his conviction in a case now on appeal; (Petition by Robert F. McPartlin For an Order Excusing Testimony, p. 3).

It very well may not be appropriate, but that is a determination peculiarly within the authority of the executive branch of the government, and as long as that "inappropriateness" is an ordinary mistake of judgment in the exercise of prosecutorial discretion, the court should not interfere. The grand jury, however, is part of the judicial branch of the government, and the court will not permit it nor its processes to be abused to affect an intentional impropriety Such purposeful and intentional improprieties have occurred from time to time since the early days of the grand jury system. In the *Earl of Shaftesbury* case and in *United States* v. *Aaron Barr*, (FC No. 14,692), we find epic examples of the need for a strong judicial arm to protect the great purposes of the grand jury and to prevent grand jury abuses. But the witness McPartlin has not made out a *prima facie* showing of such abuse here.

It is to be noted that 18 U.S.C. § 6002[1] confers "use im-

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[1] 18 U.S.C. §6002 states:

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,
(2) an agency of the United States, or

munity" not "transactional immunity." This type of immunity does not preclude the possibility that an immunized witness may very well later find himself a subject or target of the investigation of the same grand jury before whom he is required to testify. Only independent evidence, of course, that is to say, evidence not derived from his testimony or his documents or made possible in any part because of his evidence, may be utilized in pursuing an indictment against him.

In this matter no double jeopardy question is at issue at this time, since even though immunity has been conferred upon the witness, he may not be heard to complain until after the indictment is returned. A federal prosecution begins only with the return of an indictment, *Bradley* v. *United States,* 410 U.S. 605, 608-9 (1973), and not with the filing of a complaint nor by an arrest, nor by some other preliminary act in the criminal justice process. A grand jury's primary function is to act as a bulwark or screen against undue or improper prosecutions; yet in looking into possible violations of law, subject to constitutional limitations, it has the "right to everyman's evidence". *United States* v. *Calandra,* 414 U.S. 338, 345 (1974) and *United States* v. *Dionisio,* 410 U.S. 1, 9-10 (1973). Mr. McPartlin may properly be immunized (coextensively with his Fifth Amendment privilege against self-incrimination) and thereafter be ordered to testify or to produce records. *Kastigar* v. *United States,* 406 U.S. 441 (1972).

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[1] (Continued)

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

I find that the government's action here does not violate the intent of Congress in its enacting the immunity statute that prosecutions not be piecemeal. I have no indication at this time that a piecemeal prosecution has, or will, come about, a situation which could prove to be fundamentally unfair. *United States* v. *American Honda,* 273 F. Supp. 810 (N.D. Ill. 1967). Neither *Kastigar* v. *United States, supra,* nor *Goldberg* v. *United States,* 472 F.2d 513 (2 Cir. 1973) support Mr. McPartlin's argument that a criminal defendant who is appealing his conviction and sentence may be an exception to the situations in which Congress wished to permit a grant of immunity. See Hearings on H.R. 11157 and 12041 before Subcommittee No. 3 of House Committee on the Judiciary, 91st Congress, 1st Session 40-43 (1970).

I find *In Re*: *Liddy,* 506 F.2d 1293, 1301-6 (2 Cir. 1974) cited by the witness, somewhat persuasive but certainly not in any way controlling, since highly unusual matters of nation interest were there involved. The conclusion in *Liddy,* even so, is inescapable. It is that, subsequent to his conviction, a witness called before a grand jury and granted immunity may not refuse to answer questions just because he has a criminal appeal pending. See also *United States* v. *Kelly,* 464 F.2d 709 (5 Cir. 1972).

I find that the government's action here does not violate due process of law. In *In Re*: *Bonk,* 527 F.2d 120 (1975), it was held that a prior acquittal did not justify that witness' refusal to testify before the same grand jury on due process grounds where an order granting that witness immunity under 18 U.S.C. § 6002 was entered. Judge Cummings felt that the legislative history of §§ 6002 and 6003 clearly indicated that the government may immunize anyone in order to obtain his testimony. The language of § 6003 is to the effect that "*any individual* who has been . . . called to testify [and who] refuses to give . . . [information] on the basis of his privilege against self-incrimination" may be given immunity. The *Bonk* decision, supports the proposition that even when a criminal conviction is on appeal before the same tribunal which would review

the matter of a trial court's entry of a civil contempt order, due process of law is not offended.

Both *Bonk* and *Liddy* support by analogy my conclusion in the instant matter. The double jeopardy issue, collateral estoppel, and *res judicata* do not come into play until there is at least the commencement of a second prosecution by the return of an indictment.

Finally, the witness suggests that he may later improperly be subjected to an action by the Internal Revenue Service because his "use" immunity grant does not fully protect him against such matters and only covers him as to criminal cases. But since the Government states (1) that the immunity grant was not to gain civil tax information and (2) that the Seventh Circuit indicated in *United States* v. *Ingram*, 541 F.2d 166 (7 Cir. 1976) that such a question was premature at that time, and (3) that no civil tax proceeding has at this time, been brought, I find this issue still premature.

Considering all the foregoing, the witness' motion is denied, and the government's motion is allowed.

Enter:

JAMES B. PARSONS
United States District Judge

Dated: April 25, 1978

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued May 19, 1978
May 22, 1978

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

In the Matter of the Special March 1978 Grand Jury

No. 78-1552 *vs.*

Appeal of: ROBERT F. MCPARTLIN,
Respondent-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois,
Eastern Division.
No. 74 GJ 1010
JAMES B. PARSONS, *Judge.*

ORDER

This appeal presents the question of the constitutionality and propriety of granting immunity to a convicted defendant whose conviction is pending upon direct appeal and requiring such defendant to either testify before a grand jury or face punishment for contempt.

The respondent was indicted for and convicted of violations of 18 U.S.C. §§ 1343 and 1952 and is presently appealing that conviction in appeal No. 77-2258 and related

appeals before this court. On March 22, 1978, the district court granted the government's petition to grant use immunity to the respondent, based upon a letter dated February 27, 1978 and signed by the Assistant Attorney General, determining that the testimony of the respondent is necessary to the public interest under 18 U.S.C. § 6003. On April 26, 1978, the respondent, having persisted in his refusal to answer questions before the grand jury, was adjudged to be in contempt and he appealed.

The respondent does not contest his duty to appear before the grand jury but urges only that his appearance be postponed until after his direct appeal from his original conviction has been determined by this court. He bases this contention upon the due process clause and also seeks a hearing before the district court on "the necessity for respondent to testify before the grand jury at this time."

"Citizens generally are not constitutionally immune from grand jury subpoenas . . ." *Branzburg* v. *Hayes,* 408 U.S. 665, 682 (1972). Respondent's position as a convicted defendant whose appeal is pending does not in itself constitutionally immunize him from grand jury process. *Cf. In re Liddy,* 506 F.2d 1293, 1301-02 (D.C. Cir. 1974); *In re Bonk,* 527 F.2d 120 (7th Cir. 1975).

The powers of a grand jury are not unlimited and are subject to the supervision of a judge. *Branzburg* v. *Hayes, supra,* at 688. The district court recognized this when he said in his memorandum opinion and order.

> Under the instant circumstances, the burden is on the witness to come forward with some factual showing that what the United States Attorney is doing constitutes an abuse of the grand jury and its processes. He has offered nothing to show, for example, that the government is doing this just to harass him, or to trick him into a jailing for contempt while he is out on bail pending appeal, or to frustrate his pursuit of his appeal.

Section 6003 places the burden of determining the public interest upon the Attorney General and his designees. In this regard, the district court's function is largely ministerial. *United States* v. *Leyva,* 513 F.2d 774, 776 (5th Cir. 1975); *In re Grand Jury Investigation,* 486 F.2d 1013, 1016 (3d Cir. 1974). Interpreting substantially the same statutory language, the Supreme Court said in *Ullmann* v. *United States,* 350 U.S. 422, 432-33 (1956), that a "fair reading . . . does not indicate that the district judge has any discretion to deny the order on the ground that the public interest does not warrant it." *See In re Lochiatto,* 497 F.2d 803, 804, footnote 2 (1st Cir. 1974); *In re Kilgo,* 484 F.2d 1215, 1219 (4th Cir. 1973). The "necessity" in this case has been determined and it is as of now. The district court need not, and can not, hold a hearing as to the "necessity . . . at this time" for respondent to testify.

Respondent's only other argument is that it places an unfair burden upon the respondent and his attorneys to prosecute the appeal and to attend the grand jury at the same time. "Valid laws serving substantial public interests may be enforced . . . despite the possible burden that may be imposed." *Branzburg* v. *Hayes, supra,* at 682-83.

The district court's judgment is affirmed.

Affirmed.

APPENDIX B

18 U.S.C. 6002.—Immunity generally—Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee (or a subcommittee) of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. (Oct. 15, 1970, P. L. 91-452, Title II, § 201(a), 84 Stat. 927.)

18 U.S.C. 6003. Court and grand jury proceedings.—(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination. (Oct. 15, 1970, P. L. 91-452, Title II, § 201(a), 84 Stat. 927.)

28 U.S.C. 1826. Recalcitrant witnesses.—(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall succeed the life of—

(1) the court proceeding, or

(2) the term of the grand jury including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No persons confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal. (Oct. 15, 1970, P. L. 91-452, Title III, § 301(a), 84 Stat. 932.)

Cross reference.—Separability of provisions, § 1961 note of Title 18.